

REMARKS

Claims 1 - 18 remain active in this application. No amendments have been made and no new matter has been introduced into the application.

Restriction has been required between the inventions, as identified by the Examiner, of Group I, claims 1 - 13, and Group II, claims 14 - 18. A provisional election of the invention of Group I, claims 1 - 13, has been made, with traverse, above.

The requirement for restriction is respectfully traversed since the use of a "regular" sidewall rather than an "embedded" sidewall, as suggested by the Examiner to show distinctness of the identified inventions is not probative of that issue, particularly as stated by the Examiner. The examiner correctly states the criterion that distinctness can be shown between a method of manufacture and the product if the method can be used to form a materially different product or a materially different method can be used to form the claimed product. However, it is not clear whether the Examiner's assertion that a regular sidewall could be used instead of an embedded sidewall is directed to a difference in the method or a difference in the product. Neither does the Examiner assert that a method, so altered, would result in the same claimed product or that a product, so altered, would result from the same claimed method. At best, the Examiner's seems to trivially assert that a different method could be used to form a different product; an observation which is logically irrelevant to the issue of distinctness between the inventions the Examiner has identified.

Moreover, it is not clear how the Examiner considers a "regular" sidewall to differ from an "embedded" sidewall, particularly since the terms "embedded" or "buried" seems to principally indicate a

location with reference to a larger structure rather than a structural difference. Indeed, Figure 3b and the description thereof in paragraph [0042] seems to indicate that the embedded/buried spacer is structurally similar to a "regular" spacer (as the Examiner's terminology is understood); being formed on a sidewall of a structure formed by material removal and becoming embedded/buried by filling the region behind it where material was removed to create the sidewall.

Therefore, it is respectfully submitted that the example proffered by the Examiner to support the asserted conclusion of distinctness is ineffective to do so due to the lack of clarity in the Examiner's assertion, the irrelevance of the example to the criterion for determining distinctness and/or the apparently illusory nature of any difference between "regular" and "embedded" spacers which the Examiner seeks to assert. Accordingly, it is respectfully submitted that the requirement for restriction, as currently stated, should be reconsidered and withdrawn since it does not make a *prima facie* demonstration of distinction between the identified inventions. It is also respectfully pointed out in this regard that, while the Examiner has indicated different classifications for the respective identified inventions, no serious burden of examination in the absence of the requirement has been asserted by the Examiner. As the Examiner is aware, both distinctness of inventions and the existence of a serious burden of examination in the absence of the requirement must be shown in order to *prima facie* demonstrate the propriety of the requirement.

Since all requirements contained in the outstanding official action have been fully answered and shown to be in error, it is respectfully submitted that reconsideration is now in order under the

provisions of 37 C.F.R. §1.111(b) and such reconsideration is respectfully requested. Upon reconsideration, it is also respectfully submitted that this application is in condition for allowance and such action is therefore respectfully requested.

If an extension of time is required for this response to be considered as being timely filed, a conditional petition is hereby made for such extension of time. Please charge any deficiencies in fees and credit any overpayment of fees to Deposit Account No. 09-0456 of International Business Machines Corporation (Burlington).

Respectfully submitted,



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